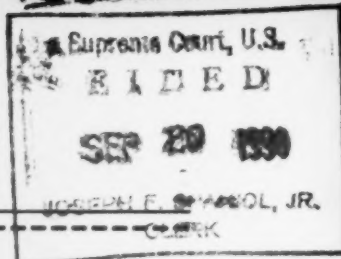


③
No. 89-1921



In The
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1989

ANTHONY J. VARCA and
MARK A. VARCA

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR
THE FIFTH CIRCUIT

PETITIONERS' REPLY BRIEF

Michael S. Pasano, Esq.
(Counsel of Record)
Guy A. Rasco, Esq.
ZUCKERMAN, SPAEDER,
TAYLOR & EVANS
201 South Biscayne Blvd.
Suite 900 - Miami Center
Miami, Florida 33131
Tel: (305) 579-0110

M. David Gelfand
Terry E. Allbritton
(Of Counsel)
2322 Valmont Street
New Orleans, LA
Tel: (504) 895-6252

Attorneys for Petitioners
Anthony J. Varca and
Mark A. Varca

BEST AVAILABLE COPY



TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES	ii
--------------------------------	----

ARGUMENT

I.	WHERE THE TRIAL COURT WAS EXPRESSLY MADE AWARE BEFORE TRIAL THAT ATTORNEYS LEMANN AND REED HAD UNACCEPTABLE CONFLICTS OF INTEREST, THE TRIAL COURT'S FAILURE TO INQUIRE INTO THE CONFLICTS OR TO CONDUCT A <u>GARCIA</u> HEARING VIOLATED THIS COURT'S SETTLED PRECEDENTS	1
A.	The Government Misses The Core Issue In Its Analysis Of The Conflicts Of Interest	3
II.	THIS COURT SHOULD ADDRESS THE IMPORTANT SENTENCING ISSUE AND RESOLVE THE 5-4 SPLIT AMONG THE FEDERAL CIRCUITS	9
A.	The Split Among The Circuits Has A Continuing Deleterious Effect .	10
B.	This Case Is An Appropriate One To Resolve The 5-4 Split Among The Circuits	12
	CONCLUSION	14
	CERTIFICATE OF SERVICE	15

TABLE OF AUTHORITIES

Cases	Page
<u>Cuyler v. Sullivan</u> , 446 U.S. 333, 348, 356 (1980)	3,4,8
<u>Porter v. United States</u> , 298 F.2d 461, 463 (5th Cir. 1962)	7
<u>United States v. Martinez</u> , 630 F.2d 361 (5th Cir.), <u>cert. denied</u> , 450 U.S. 922 (1981) . .	7
<u>United States v. O'Driscoll</u> , 761 F.2d 589 (10th Cir.), <u>cert. denied</u> , 106 S.Ct. 1207 (1986) .	10
<u>Wood v. Georgia</u> , 450 U.S. 261, 272 (1981)	4

Statutes

18 U.S.C. § 4205	9,13
Federal Sentencing Guidelines	11,13

In The
SUPREME COURT OF THE UNITED STATES

October Term, 1989

No. 89-1921

ANTHONY J. VARCA and
MARK A. VARCA

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR
THE FIFTH CIRCUIT

PETITIONERS' REPLY BRIEF

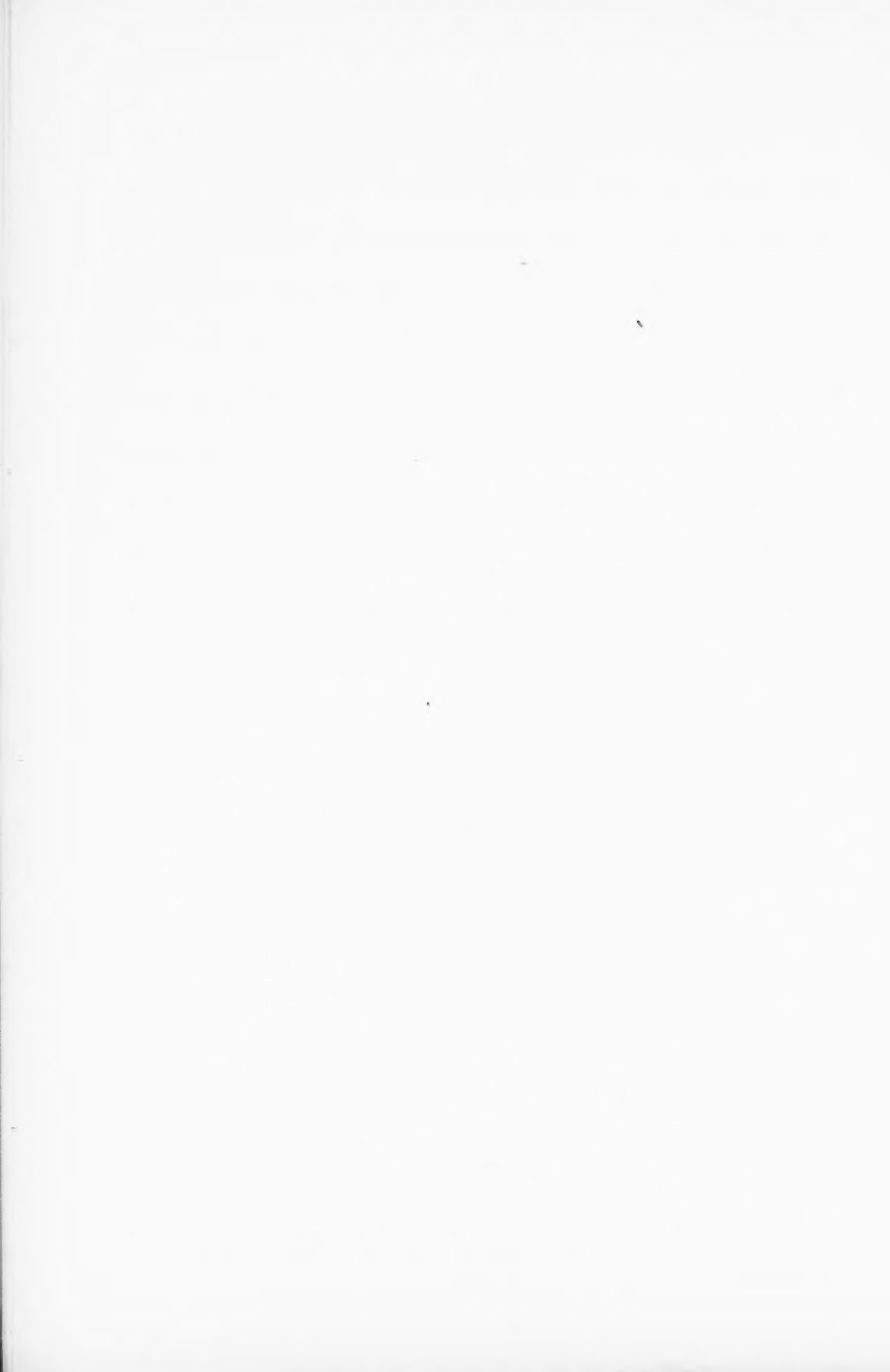
ARGUMENT

- I. WHERE THE TRIAL COURT WAS EXPRESSLY
MADE AWARE BEFORE TRIAL THAT
ATTORNEYS LEMANN AND REED HAD
UNACCEPTABLE CONFLICTS OF INTEREST,
THE TRIAL COURT'S FAILURE TO
INQUIRE INTO THE CONFLICTS OR TO
CONDUCT A GARCIA HEARING VIOLATED
THIS COURT'S SETTLED PRECEDENTS

The Government in its brief in
opposition raises various collateral arguments

in an attempt to obfuscate the real issue at the core of the conflicts of interest aspect of this case.¹ The Government's arguments do not demonstrate any justification for the lower courts' failure to follow the law of this Court. The critical facts are simple and uncontroverted. The Varcas' trial counsel, Arthur Reed and John Lemann, simultaneously represented customs officials charged in a companion indictment, whose interests were adverse to the Varcas. The Varcas expressly made the trial court aware before trial that their attorneys' conflicts of interest were unacceptable and requested that the trial

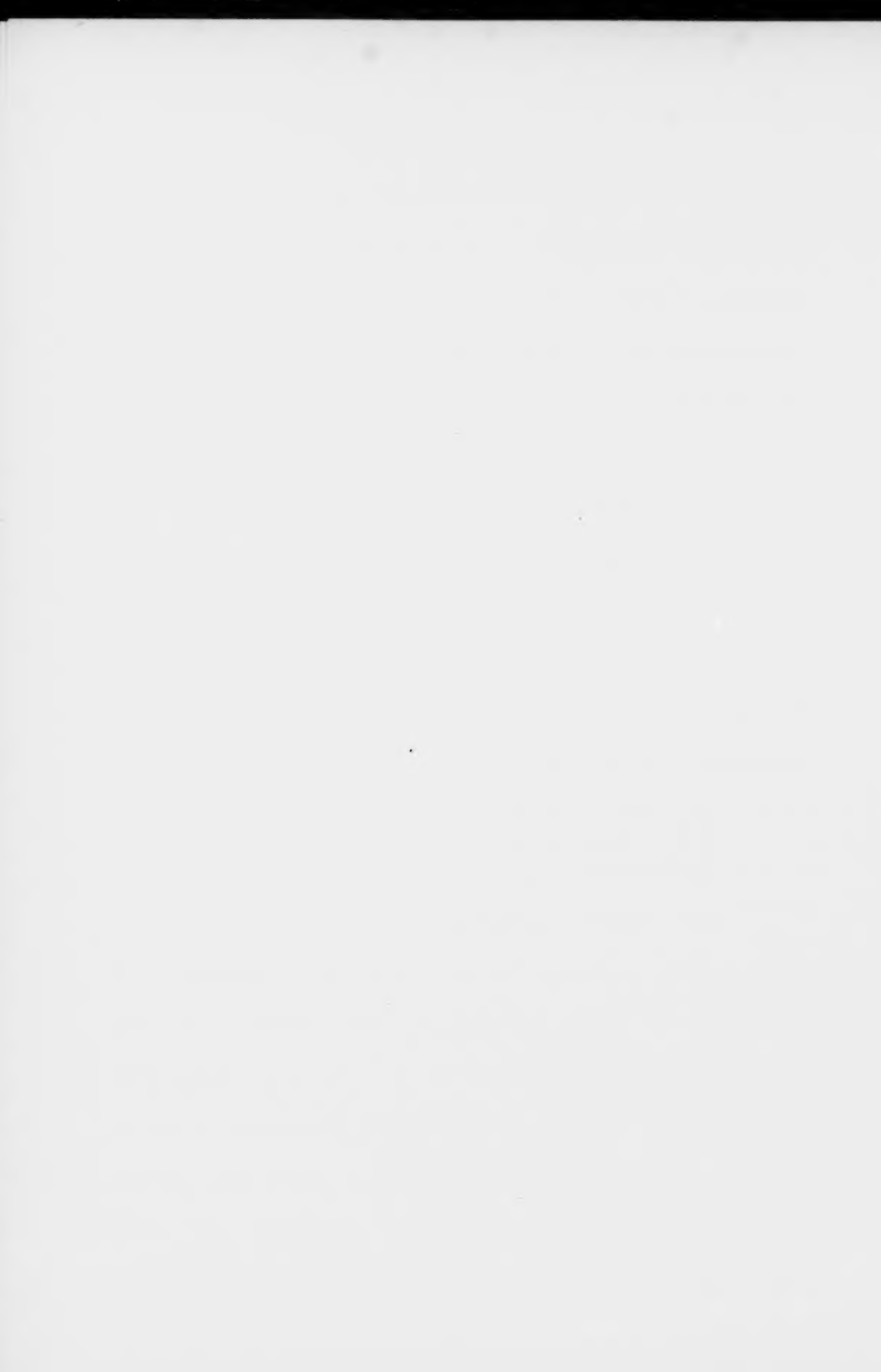
¹The Government's brief contains various factual inaccuracies and misstatements of the record, which appear primarily in its statement of the facts and concern the alleged narcotics smuggling activity itself. Because the principal issues raised in this Petition do not implicate these facts directly, we will not belabor the issue or waste the Court's time by setting out these misstatements. Our silence here should not, however, be construed to imply that we accept the Government's statement of the facts as accurate, and we reserve the right to contest the Government's alleged "facts" at a later date, if relevant.



court inquire into the conflicts and conduct a Garcia hearing. The district court did nothing and its failure to act in this situation is directly at odds with the settled precedents of this Court. This Court has clearly mandated that once a trial court has been made aware of a possible conflict of interest it must inquire into the conflict and conduct a Garcia hearing. Cuyler v. Sullivan, 446 U.S. 333, 348, 356 (1980). Thus, this Petition should be granted to correct the dangerous precedent set below.

A. The Government Misses The Core Issue In Its Analysis Of The Conflicts Of Interest

The first sentence of the Government's "argument" claims that attorneys Lemann and Reed were not disabled by conflicts of interest. Govt. brief at 7. In support, the Government argues that the customs agents represented by Lemann and Reed were not named in the same indictment as the Varcas and that the customs agents were not called as



witnesses against the Varcas. The Government further argues that if the customs agents had been subpoenaed by the Varcas to trial, the agents would not "have forgone their Fifth Amendment privilege and incriminated themselves by testifying." Govt. brief at 7.

The Government's premise, that there were no actual conflicts of interest, wholly ignores the core issue and the important district court error raised by the Varcas in this Petition. The fundamental error here is the lower courts' failure to recognize that once a trial court has been made aware of conflicts of interest it must inquire into the conflicts and conduct a Garcia hearing. Cuyler, 446 U.S. at 348, 356; Wood v. Georgia, 450 U.S. 261, 272 (1981). See Varca v. United States, Petition For Certiorari (hereinafter "Petition") at 23-25. Accordingly, when a trial court is made aware of conflicts of interest, as in this case, the only remaining issue is whether or not the trial court

conducted conflicts inquiries and Garcia hearings. The issue as to whether or not the conflicts of interest were actual is obviously premature in advance of such an inquiry or Garcia hearing.

Absent any inquiry by the district court of the Varcas' trial counsel or the Varcas themselves,² the district court could not know the full nature and scope of the conflicts of interest brought to its attention. Further, because the trial court made no inquiry into the conflicts of interest, it could not know whether the conflicts were actual and would not be able to gauge the effect such conflicts

²The Varcas and their counsel are obviously in the best position to determine whether actual conflicts of interest existed. The Varcas made clear their opinion that the conflicts were unacceptable. The views of the Varcas' counsel on the conflicts issue are unknown because the trial court did not solicit their views as required by this Court. For whatever reason, the Varcas' attorneys did not offer any opinion to the trial court after the Varcas brought the conflicts to the attention of the trial court. It would be improper to let stand the opinion below, which, on the basis of sheer speculation, wrongly interprets such silence to mean there is no conflict. See Petition at 33.

had on the Varcas. Similarly, without the benefit of a conflicts inquiry below, the appellate courts are not in a position to address the extent and effect of the conflicts of interest. Notwithstanding that the Government does not address the fundamental error below, a brief response to the Government's arguments regarding the issue of actual conflicts is appropriate.

The conflicts of interest caused by the simultaneous representation of the Varcas and the customs agents, which were brought to the attention of the trial court, were substantial. The Varcas informed the trial court that they had asked counsel to pursue a defense strategy that would involve discrediting Lemann's and Reed's customs clients and would "require an activity on the part of [the Varcas' counsel] in conflict with their attorneys' efforts on behalf of their customs clients." (R19-8); See Petition at page 17, n. 12.

It makes no difference that the customs agents were not named in the identical indictment as the Varcas. See, e.g., United States v. Martinez, 630 F.2d 361 (5th Cir.) (conviction reversed because defense counsel previously represented client that plead guilty to charges in separate indictment that related to those against current client), cert. denied, 450 U.S. 922 (1981). Similarly, it does not matter that the customs agents were not called as witnesses at the Varcas' trial or that the agents may not have testified as to the Varcas' innocence. See, e.g., Porter v. United States, 298 F.2d 461, 463 (5th Cir. 1962). Finally, the argument that the customs agents may not have testified at the Varcas' trial due to fifth amendment concerns is of no merit and is at best pure speculation. The customs agents could have been subpoenaed to trial and forced to assert any privilege in front of the jury and/or asked questions to which the fifth amendment



privilege does not extend. The attorneys' conflicts of interest made such a defense impossible.

As the above analysis demonstrates, this Court has clearly mandated that when a trial court becomes aware of conflict of interests, it shall conduct an inquiry into the conflict and a Garcia hearing. Cuyler, 446 U.S. at 348. Where the trial court knows of a conflict and fails to conduct an inquiry, a reviewing court can presume that there was ineffective assistance of counsel. Cuyler, 446 U.S. at 348. See Petition at page 25, n.19. An inquiry and Garcia hearing are the only means to determine the nature, extent and effect of conflicts of interest and whether the defendant wishes to waive any such conflicts. Not surprisingly, the Government does not and cannot cite any case where the Government prevails on appeal when a trial court has been made aware of conflicts of interest, but failed to make inquiry or hold

a Garcia hearing. No such case existed until the opinion below because such a ruling would directly contradict the decisions of this Court. Accordingly, this Petition should be granted to correct the decision below that is at odds with this Court's established precedents.³

**II. THIS COURT SHOULD ADDRESS THE
IMPORTANT SENTENCING ISSUE AND
RESOLVE THE 5-4 SPLIT AMONG THE
FEDERAL CIRCUITS**

The Government correctly acknowledges that there is a sharp conflict among the Circuits on the proper interpretation of 18 U.S.C. § 4205, but then wrongly contends that the 5 to 4 Circuit split is not significant and that the instant case is not an

³The Government's argument that the trial court properly denied the Varcas' motion, which asked the trial court to inquire of the attorneys as to the conflicts, because the request was "last minute" is wholly without merit. The Varcas timely made the trial court aware of the conflicts in advance of trial. See Petition at 30-31. Moreover, it is never too late to raise the issue of a conflicts of interest. Id.

appropriate candidate for resolution of that split. Both contentions are incorrect.

**A. The Split Among The Circuits Has
A Continuing Deleterious Effect**

The sharp split among the Circuits is terribly significant to the large pool of federal prisoners who, like the Varcas, were denied parole eligibility for more than 10 years. Contrary to the Government's assertions, the harmful effects of the 5-4 split among the Circuits are continuing. Many of the prisoners sentenced within the 5th, 8th, 9th, 10th and 11th Circuits have received very lengthy minimum parole eligibility sentences and will remain in prison for life without even the possibility of parole. See, e.g., United States v. O'Driscoll, 761 F.2d 589 (10th Cir.) (defendant received 300 year sentence and a minimum parole eligibility of 99 years), cert. denied, 106 S.Ct. 1207 (1986).



Moreover, the Government has publicly announced that it wishes to prosecute an expanding number of white collar criminal cases in connection with the savings and loan crisis. Such prosecutions, to a large extent, will involve offense conduct that occurred before November 1, 1987, which is before the reach of the new Federal Sentencing Guidelines. See Petition at 44-45. As such, the parole system will apply to the defendants in this group and they will be susceptible to disparate treatment regarding parole eligibility depending only upon the federal circuit in which they are sentenced.

This Court should decide this major sentencing issue to resolve the rights of all prisoners still serving disproportionate sentences and to correct the ongoing inequity of different sentences in different circuits imposed for the same criminal conviction.

**B. This Case Is An Appropriate One To
Resolve The 5-4 Split Among The Circuits**

Contrary to the Government's assertions, this case is an excellent vehicle for this Court to resolve the severe conflict among the Circuits and the inequity of disparate sentences in different federal courts.

The Government states on page 10 that it is unlikely that the Parole Commission would grant the Varcas parole before they served 15 years. Gov't. brief at 10. Such an assertion is sheer speculation and is irrelevant to whether the Varcas, as a matter of law, are entitled to be eligible for parole after 10 years. In any event, because the Varcas have no prior criminal history, a fair calculation of the Varcas' parole guidelines could be 40-52 months, which is substantially less than their current parole denial for 15 years.

The Government also asserts that the Varcas would have been sentenced to at least

24 years incarceration with no opportunity for parole if they had been sentenced pursuant to the Federal Sentencing Guidelines. Gov't. brief at 10, 11. Again, such a calculation under the Federal Sentencing Guidelines is inapposite to the interpretation of the parole eligibility aspects of Section 4205. In any case, the Government has miscalculated the Varcas' sentencing guidelines. The Government asserts that the Varcas' conviction involved over 100,000 kilograms of marijuana. Gov't. brief at 10. In reality, however, the amount of marijuana charged in the indictment was 51,210 pounds or only 23,277 kilograms. A fair calculation of the sentencing guideline range using the correct quantity of marijuana could be a range of 15 years, 8 months to 19 years, 7 months.

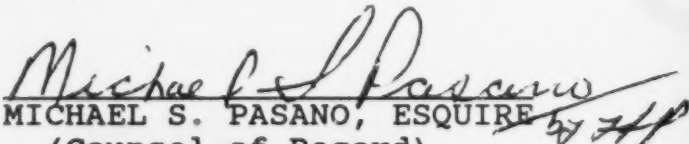
Under the proper interpretation of Section 4205, the Varcas have been denied parole for a period well in excess of that permitted in four Circuits of the United

States. As explained in the Petition at 37-45, those four Courts of Appeal have correctly interpreted the language, legislative history, and policy considerations behind the governing statutes. This is an appropriate case for resolution of that conflict among the badly fractured Circuits and to remedy the injustice inflicted on the large and growing group of other improperly sentenced federal prisoners.

CONCLUSION

For all of the foregoing reasons, and those contained in the Petition, the Varcas respectfully submit that this Court should grant this Petition for Certiorari.

Respectfully submitted,

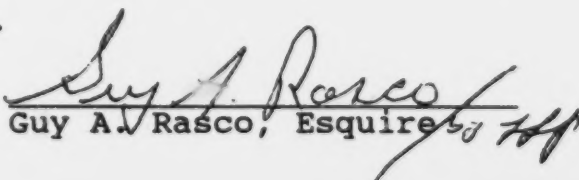

MICHAEL S. PASANO, ESQUIRE
(Counsel of Record)
GUY A. RASCO, ESQUIRE
ZUCKERMAN, SPAEDER, TAYLOR
& EVANS
201 S. Biscayne Boulevard
Suite 900 - Miami Center
Miami, Florida 33131
Telephone: (305) 579-0110

M. DAVID GELFAND
TERRY E. ALLBRITTON
(Of Counsel)
2322 Valmont Street
New Orleans, LA
Tel: (504) 895-6252

Attorneys for Petitioners
Anthony J. Varca and
Mark A. Varca

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that three (3) true and correct copies of the foregoing were mailed this 20th day of **September, 1990** to The Solicitor General, Department of Justice, 10th & Constitution Avenues, N.W., Washington, D.C. 20530; and one (1) copy to Patty Merkamp Stemler, Attorney, Criminal Division, Appellate Section, Department of Justice, P.O. Box 899, Ben Franklin Station, Washington, D.C. 20044-0899.


Guy A. Rasco, Esquire